Filed 6/16/09 In re A.R. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.R., Jr., A Person Coming Under the Juvenile Court Law.	B209416
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. H.M., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK 71240)

Appeal from the orders of the Superior Court of Los Angeles County. Stanely Genser, Juvenile Referee. Affirmed.

John Cahill, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens and Timothy M. O'Crowley, Deputy County Counsel, for Plaintiff and Respondent.

Mother H.M., who is a minor, appeals from the dependency court order taking jurisdiction of her infant son, contending the court erred by appointing a guardian ad litem for her and that there was no evidence to support the jurisdictional order. Because any error in appointing the guardian was harmless, and because sufficient evidence supports the jurisdictional order, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

In January 2008 the Los Angeles County Department of Children and Family Services (DCFS) filed a petition under Welfare and Institutions Code section 300, subdivision (b), alleging that two-week-old A.R., Jr., (minor) was at risk of harm from mother H.M. because she moved herself and the baby from place to place despite his apparent jaundiced condition and because she had an ongoing history of drug abuse.[2] Mother was herself a minor and a dependent child of the court, and was just two months shy of her 16th birthday when DCFS filed its petition. She had been declared a dependent child in 2005 because her hospitalized mother was unable to care for her and because her father was an incarcerated alcoholic. On June 10, 2008, the dependency court appointed a guardian ad litem (litigation guardian) for mother, believing it was required to do so by controlling appellate court authority. The order was stayed until June 20, 2008, to allow mother to challenge the ruling by way of a writ to this court. We summarily denied her writ on June 20, 2008 (B208558), and the matter went forward for adjudication.

At the June 23, 2008, adjudication hearing, the dependency court found true the petition's allegation based on mother's drug use, but rejected the allegation based on mother's transiency. Although the court took jurisdiction of the minor, it removed him from shelter care and placed him back with mother, and ordered that placement as the

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[1] As is often the case in these proceedings, the record is long and detailed. We have distilled the facts to those essential to our decision.

[2] The petition also included allegations against the infant's father, A.R. Although the court eventually sustained the allegations against father, he is not a party to this appeal.

permanent plan. As part of its order, the court required mother to continue with drug testing and counseling, maintain approved housing, and otherwise meet the minor's physical and emotional needs.

Mother contends the order appointing a litigation guardian violated several of her constitutional rights related to both parenting and access to the courts. She also contends the jurisdictional order was not supported by substantial evidence because the record showed she had been drug testing and her test results had all been clean.

DISCUSSION

1. Appointment of the Litigation Guardian Was Harmless Error

Code of Civil Procedure section 372 (section 372) provides that a litigation guardian ad litem shall be appointed when a minor, an incompetent person, or a conservatee appears as a party to an action. The term "shall" is directory, not mandatory, however. (*In re M.F.* (2008) 161 Cal.App.4th 673, 680 (*M.F.*).) Although not automatically applicable in dependency cases, section 372 may provide guidance in such cases. (*M.F.*, at p. 678.) In *M.F.*, *supra*, the appellate court held that the dependency court had a sua sponte duty to appoint a litigation guardian for a 14-year-old mother whose parental rights had been terminated. The court in *In re D.D.* (2006) 144 Cal.App.4th 646, 653 (*D.D.*), held that it was error not to appoint a litigation guardian for a developmentally disabled minor who was the presumed father in a dependency action.

On June 3, 2008, the dependency court in this action became concerned it had a duty to appoint a litigation guardian for mother and asked the parties to brief the matter. Counsel for the minor argued that under *M.F.* and *D.D.*, the court was obligated to appoint such a guardian for mother. Mother opposed the appointment, contending she did not want a guardian and was competent to handle her participation in the

proceedings.[3] Mother's opposition declaration stated that her attorney in this case was the same one who had represented her the last few years in the action where she was a dependent minor. They discussed the case many times, she was able to express her wishes to him, and he had already been able to increase her visitation rights. She directed the lawyer to fight for the return of her son. She also testified at a competency hearing on the guardian issue, and said she understood the nature of the proceedings, had read the petition, understood its allegations, and believed that with her lawyer's help, she was in the best position to make decisions regarding her interests and those of her son.

At the hearing, DCFS argued that appointment of a guardian was required by the decisions in *M.F.* and *D.D.* The court said it found mother to be intelligent and agreed she was able to understand the issues and communicate effectively with her lawyer. The further away from the age of 18, however, the greater the burden of showing she was competent, the court found. It therefore appointed a guardian.[4] However, recognizing its uncertainty over the applicability of the rule announced in *M.F.* and *D.D.*, the court said it "needed more direction on this issue" and effectively placed the burden on mother's counsel to seek relief from this court.[5]

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[3] Mother was originally amenable to having her sister appointed as litigation guardian, but when the sister became unavailable, mother would not agree to an alternative guardian.

[4] The guardian objected to her appointment because she believed mother was competent and was able to effectively assist in her defense and communicate with her lawyer.

[5] Effective January 1, 2009, section 372 was amended to allow minor parents such as H.M. to appear in dependency actions and certain other proceedings without a litigation guardian unless the court finds the minor is unable to understand the nature of the proceedings or assist counsel. (§ 372, subds. (c)(1), (2), amended by Stats. 2008, ch. 181, § 1 (S.B. 1612).) Although the changes to section 372 are cited in the briefs, none of the parties argues that the current version governs this appeal. We do not address the question of which version of the statute applies to subsequent proceedings in the trial court. Respondent apparently concedes the new law would govern any effort by the mother to vacate the present guardianship.

Mother contends the trial court erred because it apparently found her competent, yet forced a litigation guardian on her anyway. The decisions in *M.F.* and *D.D.* do not apply, mother argues, because those cases involved either a much younger minor parent or a developmentally disabled parent, both of whom claimed the court erred by failing to *appoint* them a litigation guardian. DCFS responds that the reasoning of those decisions applies here, and that, in any event, the record may be read as a determination that mother was in fact not competent.

We need not decide these issues, however. Assuming for discussion's sake only that mother's various constitutional rights were violated by the order appointing a litigation guardian, we will not reverse if the error was harmless beyond a reasonable doubt. (*In re James F.* (2008) 42 Cal.4th 901, 918-919.) Although DCFS raised this issue in its respondent's brief, mother did not file a reply brief and therefore has not challenged this assertion. She has never produced evidence or argued that the litigation guardian did anything to interfere with the way her lawyer handled her case. Given that the order appointing the guardian was not made until two weeks before the adjudication hearing, and was stayed until three days before that hearing, combined with the guardian's reluctance to even take on the job, it appears unlikely that any such interference occurred. Finally, although the court assumed jurisdiction over the minor, it placed him with mother and ordered that placement as the permanent plan.[6] On this record, we see no conceivable prejudice from the appointment of the guardian, and therefore affirm the order by which she was appointed.

2. *Substantial Evidence Supported the Jurisdictional Finding*

A prerequisite to assuming jurisdiction of a child under Welfare and Institutions Code section 300 is a current risk at the time of the hearing that harm to the child will

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[6] Mother acknowledges as much in her appellate brief, when she argued that a guardian was unnecessary because, with her lawyer's help, she was able to protect her rights by having the minor placed back with her.

continue into the future. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) Mother contends this was not satisfied because, at the time of the hearing, she had been taking her drug tests and the results were all negative. As a result, her former drug use posed no current, continuing risk of harm to the minor.

There was evidence that mother was addicted to crystal methamphetamine for about a year, and also used marijuana. She claimed to have given up drug use when she learned she was pregnant. Although she was ordered to submit to random drug testing at a January 8, 2008 detention hearing, a March 24, 2008 DCFS report said she had only recently begun to comply with that order. The court in *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424, held that a drug abusing father's seven-month stint of clean drug tests was an insufficient period of sobriety to amount to changed circumstances justifying a modification petition (Welf. & Inst. Code, § 388) for additional reunification services. By parity of reasoning, mother's two months of clean drug tests after her initial failure to comply with the court's drug testing order does not as a matter of law dispel the prospect that a continuing risk of drug use still existed. Mother's recent successful compliance with the drug testing order is commendable. She has been given custody of her child while she continues to work on this issue and, should her progress continue, so should her custody of the minor.

DISPOSITION

For the reasons set forth above, the order appointing a guardian ad litem and the jurisdiction order are affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.